

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

**200 STATE STREET, LLC and CORK & FORK
OSTERIA, LLC, A SINGLE EMPLOYER¹**

Employer

and

Case 04-RC-263237

717 RESTAURANT WORKERS UNITED

Petitioner

DECISION AND DIRECTION OF ELECTION

The sole issue in this proceeding is whether to hold a manual or mail ballot election. The Employer, 200 State Street, LLC and Cork & Fork Osteria, LLC, contends that the election should be conducted manually, while Petitioner 717 Restaurant Workers United advocates for a mail-ballot election. After reviewing and considering the arguments of the parties, for the reasons discussed below, I find that a mail-ballot election is appropriate as it is the safest and most efficient way to conduct the election in this case.

Petitioner filed a petition under Section 9(c) of the National Labor Relations Act (the Act), as amended, seeking to represent a group of employees of the Employer. A hearing was held by videoconference before a Hearing Officer of the National Labor Relations Board (the Board).² At the hearing, the parties reached stipulations with respect to all litigable issues, including the composition of the voting unit.³ Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Regional Director, the parties were permitted at the hearing to present their positions as to the mechanics of the election.

I. Type of Election: Manual or Mail

a. Factual Overview

The Employer operates two restaurants about eight miles apart, one in Harrisburg, Pennsylvania and the other in Camp Hill, Pennsylvania.⁴ Petitioner seeks an election in a unit of about 40 employees who work at these restaurants.

¹ The Employer's name appears as amended at the hearing.

² All dates occurred in 2020 unless otherwise noted.

³ The parties entered into an agreement resolving all eligibility questions consistent with the method approved by the Board in *Norris-Thermador Corp.*, 119 NLRB 1301 (1958). *NLRB Casehandling Manual (Part Two), Representation Proceedings*, § 11084.4.

⁴ The Employer comprises two Pennsylvania limited liability companies engaged in the operation

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been more than 5.7 million confirmed cases of COVID-19 in the United States and over 176,000 deaths.⁵ The United States has experienced a widely shifting transmission rate, including sharp upticks in confirmed cases after periods of lower transmission. From March 15 through April 12, the seven-day moving average of new confirmed cases spiked from 435 to nearly 32,000 per day.⁶ Then, there was a sustained decrease of confirmed cases, reducing the seven-day moving average to 19,912 on May 30. However, between May 30 and July 24, the seven-day moving average rose sharply to its peak of 66,960 new COVID-19 cases per day. While the number of confirmed positive cases per day is currently trending downwards, the United States is still seeing approximately 42,000 confirmed new cases per day.

I also take administrative notice of the information, guidance, and recommendations of the Centers for Disease Control and Prevention (CDC). The CDC recommendations for dealing with this public health threat include the avoidance of gatherings of more than ten people, the use of cloth face coverings, and social distancing, among other things. The CDC states that COVID-19 is “unlikely to be spread from domestic or international mail, products, or packaging”⁷ and simply advises that after handling the mail, individuals should wash their hands with soap and water or use hand sanitizer.⁸ Although not specific to Board elections, the CDC has encouraged officials to use voting methods, such as mail ballots, that minimize direct contact with other people.

In addition, many state and local governments have issued COVID-19 restrictions tailored to the conditions in their communities. In March, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency, directed the closure of all non-life sustaining businesses, and ultimately issued a statewide Stay-at-Home order. Governor Wolf later announced a plan for the phased reopening and easing of restrictions using a system of colored phases – red, yellow, and green – to apply to individual counties as they reached milestones in lowering their incidents of positive cases.⁹ As of July 13, all Pennsylvania counties had moved into the “green phase” of reopening.¹⁰ In that phase, all businesses must continue to adhere to both CDC and Pennsylvania Department of Health guidance.

of the two restaurants described above. During the past 12-month period, the Employer derived gross revenue in excess of \$500,000 from the operation of its restaurants and during that same period, the Employer purchased and received goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The parties stipulated that the two companies are a single employer.

⁵ *Coronavirus in the U.S.: Latest Map and Case Counts*, New York Times, June 23, 2020 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

⁶ <https://www.cdc.gov/covid-data-tracker/#trends>

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

⁹ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

¹⁰ The Employer’s Camp Hill restaurant is in Cumberland County, and its Harrisburg restaurant is in Dauphin County.

Public health experts continue to advise individuals to avoid unnecessary social contact and to conduct business remotely when possible in order to avoid new spikes in cases. The Commonwealth, like the nation as a whole, has experienced severe swings in confirmed case trends. On July 23, the Commonwealth experienced 1,182 new COVID-19 cases.¹¹ By August 2, that figure decreased to 579 new cases, and then spiked again to 1,039 new cases on August 12. Id. Although Pennsylvania has a decreased rate of new cases from its peak in April, there is continued concern about the transmission of the virus. Currently, travelers returning to Pennsylvania from 16 states with “high amounts of COVID-19 cases” are advised to quarantine for 14 days upon return.¹² As of August 23, Pennsylvania reported 129,048 confirmed COVID-19 cases,¹³ an incidence rate that is the twelfth highest in the nation.

b. Positions of the Parties

Petitioner argues that a mail-ballot election is more appropriate for the petitioned-for unit. In support, it highlights the risk of low employee participation in a manual election because staffing levels at the Employer’s restaurants, which are based on volume of business, remain diminished due to the pandemic. It further points out that many of the employees have multiple jobs because they work part-time with the Employer. As a result, Petitioner argues, some employees may not be willing to participate in the election, either because they are not scheduled to work the day of the election or because they have scheduling conflicts with their other jobs.

The Employer, on the other hand, advocates for a manual election. It argues there are inherent problems with mail-ballot elections, including the risk that employees will not properly complete their ballots. In this connection, the Employer argues that its Spanish-speaking employees will be unable to read the language on the ballot envelopes, which is in English, and the failure to have Spanish-language envelopes could lead to employee failure to sign the envelopes as required by the instructions, rendering the ballots void. It also notes that mail-ballot elections are unreliable, particularly where, as here, the voters are young people unaccustomed to receiving mail through non-electronic means. Regarding Petitioner’s assertion that employees may fail to participate in a manual election if they are not scheduled to work, the Employer offered to schedule all employees to work on the day of the election, which it proposes should be a Sunday or Monday. It offers to schedule 20 employees per facility and to make available a third-party shuttle with a driver to transport employees from one facility to the other for purposes of voting.¹⁴ The Employer offered to comply with the guidelines suggested by the General Counsel in his recent memorandum regarding conducting manual elections amidst the pandemic.¹⁵

¹¹ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>

¹² <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Travelers.aspx>

¹³ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>

¹⁴ In response to this proposal, Petitioner expressed reservations regarding employee willingness to use an Employer-provided shuttle to vote.

¹⁵ Suggested Manual Election Protocols, General Counsel Memorandum 20-10.

c. *Analysis*

The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998).

Although the Board generally has a strong preference for conducting manual elections, it also has a long history of conducting elections by mail. As the Board noted in *London's Farm Dairy*, 323 NLRB 1057 (1997), “[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail.” Indeed, the Board has previously rejected arguments that mail ballot elections are inherently less secure and that they would likely result in voter coercion or reduced voter participation. See *San Diego Gas & Electric*, 325 NLRB 1143, 1146 (1998); *London's Farm Dairy*, 323 NLRB at 1058. There are well-established procedures for conducting effective mail-ballot elections set forth in the Board's *Casehandling Manual (Part Two), Representation Proceedings*, at Section 11336, et seq. With respect to the alleged language barrier, ballots and Notices of Election will be provided in Spanish as well as English, and the parties will have ample time to educate all of the employees about the election procedure.

As to specific instances where mail or mixed manual-mail ballot elections are being contemplated, the Board has stated:

[W]hen deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are ‘scattered’ because of their job duties over a wide geographic area; (2) where eligible voters are ‘scattered’ in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress.

San Diego Gas & Electric, supra at 1145 (1998). A Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election will not be overturned “unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, supra at 1144, n. 4. Although the Board expects Regional Directors to exercise their discretion within the guidelines outlined above, it recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, supra at 1145.

The Board has had several occasions to apply these guidelines to the extraordinary circumstances created by the COVID-19 pandemic and has recognized there may be factors outside of the guidelines set forth in *San Diego Gas & Electric* that a Regional Director may

consider in making a determination to hold a mail ballot election in such circumstances.¹⁶ Moreover, in the context of approving video unfair labor practice hearings, the Board recently emphasized that the current pandemic constitutes “compelling circumstances” that militate against conducting proceedings in person rather than remotely. See *XPO Cartage, Inc.*, 370 NLRB No. 10 (August 20, 2020).

I find it appropriate to exercise my discretion to direct a mail-ballot election, the details of which are provided below. The circumstances surrounding the COVID-19 virus are nothing but extraordinary, and, like the rest of the United States, the Commonwealth of Pennsylvania, including the area where the Employer’s restaurants are located, has been strongly affected by the virus and continues to be affected.

I have considered the accommodations and arrangements offered by the Employer but find that they are inadequate under the circumstances. Manual election procedures inherently require substantial interaction among voters, observers, party representatives, and the Board Agent, all of whom must be present at the Employer’s restaurant, and each interaction increases the risk to the participants. All but the voters would need to gather for pre-election conferences, including the check of the voter list and the parties’ inspection of the voting areas. The Board Agent and observers would share a voting area for the duration of the proposed manual election. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, for instance in the case of a challenged ballot where the Board Agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange and pass the required envelopes, and initial the appropriate section of the challenge envelope. See Casehandling Manual Section 11338.3. At the conclusion of balloting, the Board Agent would count the ballots, typically in the same voting area, with the observers, party representatives, and other employees who wish to attend.

There is also a significant risk of voter disenfranchisement for any voter who is diagnosed with COVID-19 immediately preceding the election or is required to self-quarantine. A manual election may not only result in voter disenfranchisement, but also the potential transmission of the virus by asymptomatic employees. These risks are eliminated by use of the Board’s mail-ballot procedures.

Moreover, the circumstances of this election present particular safety problems in conducting a manual election. The servers, bartenders, and hosts work at jobs that involve regular interaction with the public. The 40 employees in the petitioned-for unit work in restaurants in two localities. The Employer has proposed a four-hour voting period to accommodate all employees on all shifts and has offered to provide a shuttle to transport employees to and from the voting site to minimize any inconvenience to them. This procedure would pose an unnecessary risk of exposure to the employees who will be required to sit together in an enclosed vehicle, along with a driver, where social distancing may be impossible. Additionally, the proposed length of time for polling means the Board Agent and observers would necessarily remain in public space for an

¹⁶ *Atlas Pacific Engineering Company*, 27-RC-258742, n. 1 (May 8, 2020); see also *Touchpoint Support Services, LLC*, 07-RC-258867, n. 1 (May 18, 2020) (Unpublished order); *Pace Southeast Michigan*, 07-RC-257046, n. 1 (August 7, 2020).

extended period of time, which increases the risk of exposure. Although the Employer has proposed to make arrangements to ensure employees are able to vote, that does not alleviate the concern of forcing employees to choose between exercising their right to vote in the Board election and risking exposure to COVID-19, as well as the concern for the risk of exposure for the Board Agent and party representatives.

In addition to the safety concerns noted above, a manual election is also undesirable in the current circumstances because it could result in decreased voter turnout. Thus, several employees in the petitioned-for unit work hold more than one job and may not be available on the scheduled day to participate in the election. Other employees may be unwilling to take the risk of endangering their health in order to vote.

Under these circumstances, I conclude that a mail-ballot election is warranted as it will best protect both the employees' right to participate in the election and the safety of all parties.

II. Conclusions and Findings

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is a single employer engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction.
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time bartenders, cooks, dishwashers, hosts, and servers employed by the Employer at its Harrisburg, Pennsylvania and Camp Hill, Pennsylvania facilities.

Excluded: All office clerical employees, General Managers, Bar Managers, managerial employees, confidential employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish

to be represented for purposes of collective bargaining by 717 Restaurant Workers United.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on **September 8, 2020**. Voters must return their mail ballots so that they will be received by close of business on **October 6, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

The mail ballots will be commingled and counted on **October 13, 2020** at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date. In order to be valid and counted, the returned ballots must be received by the Region Four office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Election Clerk Ed Canavan at (215) 597-7618 no later than 5:00 p.m. on **September 22, 2020** in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending August 23, 2020 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers)

of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by Thursday, August 27, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. The Notice and the ballots will be published in English and Spanish. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 25, 2020



HAROLD A. MAIER

Acting Regional Director, Region Four
National Labor Relations Board